(2)

NO. 85-8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JERRY McCOMMON,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether probable cause existed for issuance of a search warrant.

2. Whether the warrant was based upon facts that were materially false or recklessly made.

3. Whether the issuing magistrate was neutral and detached.

4. Whether the search warrant, whether valid or not, was necessary under the Carroll doctrine.

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi affirming the conviction herein is reported at McCommon v. State, 467 So.2d 940 (Miss. 1985).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment IV, Constitution of the United States, is set out in the Petition.

Section 41-29-157(2), Mississippi Code of 1972 (in pertinent part):

> A search warrant shall issue only upon an affidavit of a person having knowledge or information of the facts alleged, sworn to before the judge or justice court judge and establishing the grounds for issuing the warrant. If the judge or justice court judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be searched, the purpose of the search, and, if appropriate, the type of property to be searched, if any.

STATEMENT OF THE CASE

The Respondent adopts the Petitioner's Statement of the Case except for (1) the statement at page 7 of the Petition that "Several of the statements contained in this document [the Affidavit] were untrue and were known by the affiants to be untrue", and (2) the statement at page 8 that "The Justice Court Judge testified ...that he issued the warrant based on the fact that it was requested by two sworn officers of the law, rather than anything stated in the underlying facts and circumstances".

SUMMARY OF THE ARGUMENT

The Affidavit was more than adequate to establish the existence of probable cause to search the trunk of Jerry McCommon's car. The "two-pronged" test, urged by Petitioner, is inappropriate,and analysis should proceed under the "totality-of-the-circumstances" test, as was done by the Mississippi Supreme Court. The informant's tip was not fundamental to the establishment of probable cause in this case.

The facts claimed by the Petitioner to be "materially false or recklessly made" amount, at the most, to negligence or innocent mistake as to essentially peripheral matters.

The justice court judge who issued the warrant was not a model of neutrality and detachment; neither was he a rubber stamp for the police. The record supports the Mississippi Supreme Court's conclusion that his neutrality

and detachment were sufficiently established. In any event, the issuing magistrate's subjective feelings, whatever they may have been, do not present grounds for reversal of a conviction if, objectively, the Affidavit states an adequate basis for the finding of probable cause.

Even if the warrant should be found to be invalid, the conviction must stand because a warrantless search would have been permissible under the circumstances here since probable cause was present.

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

THE SEARCH WARRANT WAS VALID.

A. THERE WAS PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT.

The Affidavit in support of the application for the search warrant presented the following matters tending to establish probable cause: (1) The affiants were experienced narcotics law enforcement agents. (2) One of the agents, some five months earlier, had arrested McCommon in Jackson, Mississippi, for possession of cocaine. The search incident to that arrest had revealed a large amount of marijuana debris in the trunk of McCommon's vehicle, and the agent had been informed that McCommon was running marijuana from Miami, Florida, in his vehicle. (3) Some two months earlier, two persons described in the affidavit as associates

of McCommon had been arrested in Alcorn County, Mississippi, for possession of a large quantity of marijuana. The affidavit alleged that one of the vehicles involved in that arrest belonged to McCommon. Investigation had revealed that McCommon was in Miami at the time one of these persons arrived there by commercial airline.

(4) Southern Florida is a major gateway for illegal narcotics into the United States.

(5) The agents had observed McCommon arrive at the Jackson Airport and drive away. The agents were told by an informant that McCommon would be driving to Miami possibly to pick up a load of drugs. The agents had followed McCommon from the Jackson Airport to Miami and then back to Mississippi, confirming the informant's statement that McCommon would be driving to Miami and back. (6) In Miami, the agents had observed McCommon at a residence occupied by a person known to the D.E.A. as a "Marine Smuggler".

(7) On the way back from Miami, McCommon's vehicle had sagged in the rear, though it had not done so on the trip to Miami. (8) When stopped by the agents on the highway, McCommon had lied to them, stating that he was returning from a two-day camping trip on the Mississippi Gulf Coast.

The following matters tended to diminish the likely existence of probable cause: (1) The basis of the informant's knowledge was not stated. (2) The basis of the affiant's belief in the informant's reliability and credibility was not stated. (3) The informant's tip was not detailed. (4) The informant's tip was modified by the word "possibly". (5) The affiants did not actually see any drugs or any suspicious looking transfer at the residence in Miami, and therefore could not verify the informant's statement that McCommon's purpose was to pick up drugs. (6) Southern Florida, in addition to being a

center for narcotics activity, is a popular vacation area.

Under Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the sort of technical analysis of the informant's tip urged by the Petitioner here may have been in order. Respondent uses the word "may" because the informant's tip in this case did not have the kind of "fundamental place in this warrant application" as did the tip in Spinelli (supra, 393 U.S. 414, 89 S.Ct. at 588, 21 L.Ed.2d at 642), and because the affidavit here did not present the affiants' "mere conclusion" of illegal activity, as did the affidavit in Aguilar (supra, 378 U.S. at 113, 84 S.Ct. at 1513, 12 L.Ed.2d at 727).

The informant's tip in this case played a relatively small role in establishing probable cause. McCommon was known by these officers

prior to receipt of this informant's tip. Here, unlike the situations in Aguilar and Spinelli, the other parts of the affidavit supported the finding of probable cause. In addition, the tip was substantially corroborated by the fact that McCommon did drive to Miami and back to Mississippi, as the informant had said he would.

The Petitioner acknowledges that Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), has been decided but apparently urges that Aguilar/Spinelli is still the established method of probable-cause analysis. As the decision in Massachusetts v. Upton, ___ U.S. ___, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984), emphasizes, Gates and not Aguilar/Spinelli states the proper method of analysis.

The Mississippi Supreme Court deliberately and correctly applied the Gates "totality-of-the-circumstances" analysis and correctly found that probable cause was established and that the

trial judge properly overruled the motion to suppress. The affidavit provided a more than "substantial basis for the issuance of the warrant" and more than a "'fair probability that contraband or evidence of crime'", Upton, supra, ___ U.S. at ___, 104 S.Ct. at 2088, 80 L.Ed.2d at 727, would be found in the trunk of McCommon's car.

B. THE SEARCH WARRANT WAS NOT BASED UPON FACTS THAT WERE MATERIALLY FALSE OR RECKLESSLY MADE.

(1) The only witness who was cross-examined with regard to the allegations of the third paragraph of the affidavit (the arrest in Alcorn County) was Agent Coleman (R. 123-126, 134-135). Coleman was asked by defense counsel, "[H]ow do you know he [McCommon] owned that car?" Coleman answered, "The tag was registered in his name" (R. 124). Counsel asked, "Did you honestly believe this car was registered to Mr. McCommon?",

and Coleman answered, "Yes, Sir, I did" (R. 125). Petitioner misstates the situation by representing in his brief that it was developed at the suppression hearing that the agents "actually had no idea to whom the car was titled."

It is of small consequence that the agents' information as to the Alcorn County arrest was based on hearsay and was not personally checked by the agents as to its veracity. "[A]n affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant." Aguilar, supra, 378 U.S. at 114, 84 S.Ct. at 1514, 12 L.Ed.2d at 729.

(2) Petitioner does not state what difference it should have made to the issuing magistrate that the informant communicated with Agent Coleman rather than with the affiant, Agent Barrett. The agents were working closely with one another and had been throughout the operation.

The record does not demonstrate that the informant did not communicate with Barrett. The only testimony on the question was that of Coleman, who testified he did not know whether the informant had communicated with any officer or agent other than himself (R. 139-140).

(3) The affidavit did not allege that Mary (or Marie) Canovis owned the house but that it was "occupied by a person known to the Drug Enforcement Agency as a Marine Smuggler." The agents did believe that the woman they observed in the residence was Canovis, based on the fact that her car was parked outside the house (R. 64, 66).

The Petitioner has not shown that the affidavit contained any deliberate falsehood or reckless disregard for the truth. At the most, the Petitioner has alleged "negligence or innocent mistake", and such allegations are insufficient to overcome the presumption of validity with

respect to the affidavit. Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed. 2d 667, 682 (1978).

C. THE SEARCH WARRANT WAS ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Justice Court Judges (formerly, justices of the peace) are among those judicial officers authorized by Section 41-29-157(2), Mississippi Code of 1972, to issue search warrants under the Mississippi Uniform Controlled Substances Law. Judge Mangum was acting within his statutory authority as a justice court judge for District Two of Simpson County, Mississippi (R. 150). The office of justice court judge is officially neutral and detached from the police and a justice court judge is not a prosecutor or law-enforcement officer. Cf, Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971).

There are two ways to view Judge Mangum's testimony at the suppression hearing. The Petitioner's view is that Judge Mangum said, in effect, that he issued the warrant because the affiants were law-enforcement officers.

Another view, and Respondent believes it is the better one, is that Judge Mangum was saying he believed the allegations made in the affidavit because the affiants were law-enforcement officers.

At the hearing, Agent Campbell testified, "I...typed up the Affidavit and gave it to Judge Mangum. He read it" (R. 47); "I basically told Judge Mangum the extent of the investigation and ...I typed up the Affidavit...and...I observed him read...those Underlying Facts and he then signed the Affidavit...and Search Warrant" (R. 56).

On cross-examination, defense counsel asked Judge Mangum, "Now, did you review these Underlying Facts and Circumstances before you signed

this Affidavit?", and the judge answered, "I did."

Counsel's next questions and the judge's answers are important to this analysis because they reveal that the judge did in fact consider the allegations in the affidavit and because they reveal that what the judge was talking about at the hearing was his acceptance of those allegations as true because the affiants were sworn law-enforcement officers:

> Q. Did you rely on everything in there before you issued this Search Warrant?
>
> A. I put the man under oath and I had no reason not to believe him.
>
> Q. Now, you say the 'man?'
>
> A. Or the men under oath, men under oath.
>
> Q. Okay, you put the men under oath?
>
> A. That's exactly right.

Q. And then based on what they told you--

A. That's exactly--that's the reason I--

Q. --you issued the Search Warrant?

A. That's right.

Q. Okay. Now, I notice a statement in here [regarding McCommon's presence at the residence in Miami]. Now, you had that information available to you?

A. That's right.

Q. And you believed that?

A. That's exactly right.

Q. And your belief on that statement is part of the reason you issued the Search Warrant?

A. That's right.

Q. Okay. Now, there is a statement in here [regarding McCommon's statement that he had been camping on the Mississippi Gulf Coast]. Okay, now, you relied on that statement as part of the reason for giving the Search Warrant?

A. Well, they--

Q. They told you he had lied about that, didn't they?

A. That's exactly right.

Q. Okay. And the fact that he had made that statement to him when they knew that that was a lie is part of the reason that you-- as underlying facts and circumstances that caused you to issue the Search Warrant?

A. Well, I had no reason not to believe them.

Q. I'm not saying whether or not you didn't believe them or not. I'm saying that those are some of the facts that caused you to issue the Search Warrant?

A. That's correct on their statement--

Q. Because they said, 'Okay, the man said he had been to the Gulf Coast, he had been to the KOA Campground, we know he's lieing [sic] because we followed him to Florida.' Okay, the fact that they told you that was part of the reason why you issued the Search Warrant--

A. That's correct.

Q. --because he had lied to them?

A. Exactly. After they had been placed under oath, now.

Q. I understand that. I'm not talking about when that sequence happened. I'm talking about the fact that they told you that he had lied about where he had been when they knew he had been to Miami and he had told them he had been to the KOA Campground and they knew he was lieing [sic] and they told you that you said, well, I think that's part of the reason why we ought to issue a Search Warrant, didn't you?

A. That's right.

Q. Okay. And they also told you that he had some associates arrested up in Alcorn County for possession of 500 pounds of Marijuana, didn't they?

A. I believe they made a statement to that fact.

Q. And you relied on that also? (Showing the witness.) Up at the top here.

A. (Witness examines the document.) Now, wait a minute. You're saying 500 pounds and it doesn't say anything about 500 pounds in this.

[At this point counsel and the witness became confused as to which paragraph of the

affidavit was being discussed (R. 162-164)].

Q. All right. Now, if, in fact, two associates of Mr. McCommon-- if the two people arrested in Alcorn County for possession of 500 pounds of Marijuana were not associates of Mr. McCommon, would that have made any difference to you?

A. No, I don't think it would.

Q. It wouldn't have made any difference? All right, if the fact that he had not been seen at the-- if he had not been to the residence in Miami, Florida, of a documented marine drug smuggler, would that have made any difference to you?

A. Yes, if they hadn't mentioned it, it would have made a difference.

Q. In other words--

A. When they stated that in the underlying facts there, that's more proof that they needed a Search Warrant.

Q. Okay. If they had not told you that--I'm going to read this and I'm going to read it while you're looking at it. If they had not made this statement, 'On October 4, 1982, McCommon was observed by affiants at a residence in Miami, Florida, who was occupied by a person known to The

> Drug Enforcement Administration as a Marine Smuggler,' now if that statement was not in there or if you knew that statement was not true, would that have made any difference in your issuing of this Search Warrant?
>
> A. No, it wouldn't.
> (R. 159-165).

[At this point begins the portion of Judge Mangum's testimony excerpted by the Petitioner in his brief (R. 165-167).]

Again and again Judge Mangum testified that he read and considered the allegations in the affidavit in deciding that probable cause existed; again and again he stated that he believed those allegations to be true because the affiants were law-enforcement officers and because they were under oath.

In ruling on the claim that Judge Mangum was not acting as a neutral and detached magistrate, the Mississippi Supreme Court found as follows:

> Judge Mangum was called as a witness for the state during the suppres-

sion hearing in this cause. On cross-examination by the defense attorney, Judge Mangum testified that he relied primarily on the fact that the people who requested the warrant were sworn police officers rather than anything in particular in the affidavit of underlying facts and circumstances. Judge Mangum did add however, 'Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it.'

McCommon asserts that the judge's testimony that he primarily relied on the fact that sworn police officers were asking for the warrant is evidence that he was not a neutral and detached magistrate. We disagree. Judge Mangum's testimony that he would not have issued the warrant had he not thought it appropriate is evidence that he was not serving 'merely as a rubber stamp for the police.' McCommon v. State, 467 So.2d 940, 942 (Miss., 1985).

As the Petitioner's brief shows, Judge Mangum did say he felt it was his duty to help the police fulfill their duties, and Judge Mangum did answer "That's right" to the question, "And it's really based on the request other than any particular thing he might tell you?" (R. 166). These statements, read out of the context of

the judge's other testimony, cast the judge in an unfair light. Taking the judge's testimony as a whole, Respondent submits that Judge Mangum did "judge for himself the persuasiveness of the facts relied on by [the] complaining officer to show probable cause." Aguilar, supra, 378 U.S. at 113, 84 S.Ct. at 1513, 12 L.Ed.2d at 727, quoting Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503, 1509 (1958).

That Judge Mangum's testimony revealed a pro-police, non-judicial attitude was recognized by the Mississippi Supreme Court, which expressed its strong disapproval of Judge Mangum's attitude in the majority opinion (467 So.2d at 942) and even more forcefully in the concurring opinion (467 So.2d at 943-945). The Court's response was both appropriate and adequate: the reviewing court's task was "merely [to] decid[e] whether the evidence as a whole provided a 'substantial basis' for the magistrate's finding of

probable cause" and not to conduct a "de novo probable cause determination." Upton, supra, ___ U.S. at ___, 104 S.Ct. at 2088, 80 L.Ed.2d at 727. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrate." United States v. Leon, ___ U.S. ___, ___, 104 S.Ct. 3405, 3418, 82 L.Ed.2d 677, 694 (1984).

Probable cause was fully present and fully established, and Judge Mangum's subjective state of mind, however viewed, provides no basis for reversal of this conviction. As stated by the trial judge,

> [I]n overruling the Motion to Suppress, it is my understanding that if there was sufficient evidence either in the statement made--written statement made by the officers or in the testimony that they gave to Judge Mangum to justify Judge Mangum to find probable cause, regardless of what his personal feelings were, I mean what made him do it, whether he had egg for breakfast or something bitter, I don't think would enter into it. I think if it's there,

then that is sufficient. (R. 170).

As stated in the specially concurring opinion of the Mississippi Supreme Court,

> It is also my view that the Constitution does not require a reviewing court to probe the state of mind of every magistrate who issues a search warrant, and the majority opinion should so state.
>
> In this case it is abundantly clear that the officers had probable cause to make the affidavit, and that the magistrate was furnished with facts constituting probable cause. Furthermore, he held an officially neutral and detached position from the officers.
>
> Neither the circuit judge nor we are required to go further. 467 So.2d at 946.

II.

EVEN IF THE SEARCH WARRANT WERE NOT VALID, THE EVIDENCE WAS ADMISSIBLE BECAUSE NO SEARCH WARRANT WAS NECESSARY.

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), "holds a search

warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419, 428 (1970). In the present case, as in Carroll and Chambers, the search had to be made immediately without a warrant or the car had to be held for the length of time necessary to obtain the warrant: "Given probable cause to search, either course is reasonable under the Fourth Amendment." Id., 399 U.S. at 52. The later search at the jail was equally permissible. Texas v. White, 423 U.S. 67, 68, 96 S.Ct. 304, 305, 46 L.Ed.2d 209, 211 (1975).

Even if it were to be found that the search warrant herein was constitutionally insufficient,

the conviction is valid because the agents acted upon probable cause, as Respondent has argued above, under Part I-A. See also, California v. Carney, ___ U.S. ___, 37 Cr.L.Rptr. 3033 (1985); United States v. Johns, ___ U.S. ___, 36 Cr.L. Rptr. 3134 (1985).

CONCLUSION

Under the "totality-of-the-circumstances" analysis mandated by Gates and applied by the trial court and the Mississippi Supreme Court in this case, the affidavit was more than sufficient to justify the issuance of the search warrant. The record demonstrates that the issuing magistrate considered the allegations in the affidavit and based his decision to issue the warrant on his finding that the affidavit stated probable cause; he did not act as a rubber stamp for the police. It is the adequacy of the affidavit, and not the subjective feelings of the magistrate, that the reviewing court must consider in deciding whether the principles of the Fourth Amendment have been violated in a particular case, and even if the record showed (which this record does not) that the magistrate had failed to weigh and consider the affidavit's

allegations, no cause for reversal would be present.

The Respondent therefore respectfully submits that the Petition for Writ of Certiorari herein ought to be denied.

Respectfully submitted,

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CERTIFICATE

I, Wayne Snuggs, an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief in Opposition to the following:

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This, the 3RD day of October, 1985.

/Wayne Snuggs
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